

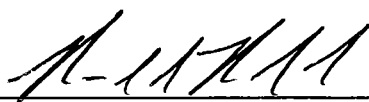
**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

<b>OTTERBEIN MONCLOVA, LLC,</b>	:	
	:	<b>CASE NO. 8-RC-17030</b>
<b>Employer,</b>	:	
<b>and</b>	:	
	:	
<b>UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 75</b>	:	
	:	
<b>Union.</b>	:	

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**UNION'S STATEMENT IN OPPOSITION TO  
EMPLOYER'S MOTION FOR RECONSIDERATION**

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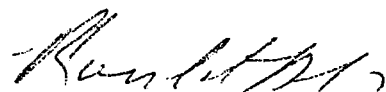
### **The Union's Position**

The Employer is attempting to circumvent Board precedent, its own lack of evidence presented at the hearing, and the evidence presented at the hearing in its Motion for Reconsideration. The Employer has offered no extraordinary circumstances to support its Motion for Reconsideration.

There is nothing unique about what the Employer terms the "Avalon model" that would require the abandonment of a community of interest analysis. To the contrary, the Employer's own witnesses testified to the similarity in the duties of Elder Assistant (aides) at Avalon and other nursing homes in reporting on resident care (Rehklau Tr. 298). The record is replete with evidence establishing the lack of community of interest between the Elder Assistants and the other classifications the Employer sought to work in the bargaining unit.

The lack of community of interest between the Elder Assistants and the other classifications is best explained in the Union's Post Hearing Brief (copy attached) and the Regional Director's Decision. The Motion for Reconsideration should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ronald Rahal", written over a horizontal line.

Ronald Rahal, Attorney at Law

### **Certification of Service**

This is to certify that a copy of United Food and Commercial Workers Local 75's Statement in Opposition to the Employer's Motion for Reconsideration was served, upon the following parties by e-mail and certified mail on this 25th day of June 2010.

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Ronald Rahal

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD (REGION 8)**

Otterbein Monclova, LLC

Case No. RC-17030

Employer

**POST HEARING BRIEF OF PETITIONER**

and

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**INTRODUCTION**

On or about April 1, 2010, United Food and Commercial Workers Union Local 75 (hereinafter Local 75) filed an R.C. petition to represent a unit of employees at Avalon by Otterbein (hereinafter Avalon) in Monclova, Ohio. Specifically, the petitioned for unit is:

All full time and regular part time elderly assistants in housekeeping at the 5069 Otterbein Way facility, excluding all professional employees, office and clerical employees, maintenance, per diem, supervisors and guards, as defined in the Act.

A hearing on the bargaining unit was scheduled for April 9, 2010 at the National Labor Relations Board office in Cleveland, Ohio. The hearing was rescheduled for April 16, 2010 at the Michael DiSalle Government Building in Toledo, Ohio. The hearing began on April 16, 2010 and concluded on April 19, 2010.

As noted at the beginning of the hearing, the issues to be determined by the Regional Director are whether the six LPNs, two RNs, two Diet Techs, one business office coordinator, one quality of life person, and one housing coordinator, should be included in the unit. (Tr. 10-11)<sup>1</sup> It is Local 75's position that the above positions should not be included in the unit and it is the employer's position that they should be included in the unit.

At the hearing, the employer presented the testimony of Sue McConn (Vice President of Avalon), Cynthia Starky (Guide at the Monclova facility), Marsha Curavo (MDS nurse), and Emily Rehkla, (a third shift LPN). Local 75 presented the testimony of two witnesses, Joyce Cain, an Elder Assistant who has worked all three shifts at Avalon, and Tamara Turner, an Elder Assistant who has worked second and third shift at Avalon.

Numerous exhibits were entered into evidence and the hearing concluded on April 19, 2010. The parties were granted an extension through May 3 to file their post-hearing briefs.

## **FACTS**

### **A. Overview Of The Avalon Facility.**

Avalon is a long term care facility and consists of five houses with approximately 10 residents (referred to as elders) assigned to each house. The Elder Assistants work three shifts covering the entire day. On first shift, two Elder Assistants are assigned to each of the five houses. On second shift, two Elder Assistants are assigned to each of the five houses. On third shift, one Elder Assistant is assigned to each of the five houses. (McConn Tr. 24-29) The Elder

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<sup>1</sup> Citations to the hearing transcript will be cited to by the name of the witness and the transcript page number "\_\_\_ Tr. \_\_\_." Petitioner's exhibits will be cited as "P. Ex. \_\_\_" and the Employer's exhibits will be cited as "E. Ex. \_\_\_."

Assistants are assigned to a particular house every day and do not rotate between the houses.

(McConn Tr. 29) All the other classifications (nurses, diet techs, etc.) rotate between the houses. (McConn Tr. 91-94)

The administrator of Avalon is Cynthia Starky. Her title is that of Guide. (McConn Tr. 76, Starky Tr. 134) The Elder Assistants are directly supervised by Gene Eddy, who is given the title of Coach. (Starky Tr. 214-215) Mr. Eddy is not a nurse. (McConn Tr. 71)

The Quality of Life Coordinator (Activities Coordinator) Jan Madden, is directly supervised by Cynthia Starky, the Guide. (McConn, Tr. 123) The Business Coordinator, Lindsay Crompton, is directly supervised by Cynthia Starky. (McConn Tr. 123-124) The Diet Techs are directly supervised by Cynthia Starky, as is the Housing Coordinator. All the nurses are supervised by Karen Dean, the Director of Nursing (referred to as Healthcare Coordinator). (McConn Tr. 87) Elder Assistants complete an STNA program, which requires at most one month of schooling. Sixty hours of classroom work is required, and 16 hours of clinical work. (Curavo Tr. 153, Rekhla Tr. 297) An STNA exam must then be passed.

Prior to being hired, the Elder Assistants are interviewed by the Coach. (Cain Tr. 308-309) After being assigned to a specific building, the Elder Assistants “provide all the daily functions needed in each home.” (P. Ex. 1 p. 2, McConn Tr. p. 96) It is the skilled professionals (the nurses) who provide all the skilled nursing care. (P. Ex. 1 p. 2; McConn Tr. p. 96-97)

The daily functions that the Elder Assistants provide include giving the elders showers and baths, brushing the elders' teeth, getting the elders ready for bed, cooking the meals for the elders, serving the meals to the elders, changing the linen and doing the laundry, attending to all the elders' grooming needs including cutting nails, cleaning, mopping, and when there are pets, it is the Elder Assistants who take care of the pets. These are the major functions of the Elder Assistants' job. (McConn Tr. 92-94, Starky Tr. 213-214, Rehklau Tr. p. 290; Cain Tr. 309-310; Turner Tr. 352)

The Elder Assistants also enter Activities of Daily Living (ADLs) into the computer, which are simply notations such as the weight of an elder. (Cain Tr. 314-315, Turner Tr. 351-352) Anything unusual is obviously reported to the nurse. Nursing aides at all different types of long term care facilities have some charting duties and report their observations to nurses. The employer's own witness LPN, Rehklau, testified that she previously worked at a more traditional facility and at the more traditional facility aides reported observations to the nurses. (Rehklau Tr. 298) Ms. Turner, who has been an aide for 21 years testified that she worked at other facilities as a nurse's aide and she had to chart. (Turner Tr. 363-365) The vast majority of the Elder Assistants' shift is taken up by tasks such as mopping, taking out the trash, cleaning out the refrigerators, doing laundry, cooking, cleaning, and grooming the elders. (Cain Tr. 316; Turner Tr. 334, 352)

The Elder Assistants are evaluated by the Coach, Gene Eddy (Cain Tr. 316-317; Turner Tr. 346) Elder Assistants have never filled in for any of the job classifications at issue, including

the nurses. (Starky Tr. 207-209) Similarly, none of the other job classifications, including the nurses, have ever filled in for the Elder Assistants. (Starky Tr. 207-209) Ms. Cain testified:

- Q. In your 19 months, have you worked all the shifts?  
A. Yes.  
Q. What other houses have you worked in?  
A. All of them.  
Q. All of them?  
A. Yes, sir.  
Q. Okay. So, in your 19 months, you can testify as to how—how often you would see a nurse on a regular basis; correct?  
A. Yes.  
Q. How often in an average shift would you see a nurse?  
A. Usually between an hour and a half and two hours.  
Q. In your 19 months at all the different houses and all the different shifts –  
A. Uh-huh.  
Q. --how many times did a nurse come down and sit at the table and eat with the residents?  
A. In all the months I've been there, none.  
Q. Never.  
A. Never.  
Q. Okay. How about Ms. Starkey—  
A. Never.  
Q. --in the 19 months in all the different houses on all the different shifts you worked, how many times did she come down and eat a meal with the residents?  
A. Never.  
Q. Now, Mr. Petrie talked about the team concept.  
In your 19 months on all the different shifts and all the different houses, how many times did a nurse come in and do the laundry?  
A. Never.  
Q. In your 19 months on all the different shifts and all the different houses, how many times did a nurse come in and cook a meal?  
A. Never.  
Q. In your 19 months on all the different shifts, in all the different houses, how many times did a nurse come down and serve a meal?  
A. Never.  
Q. Okay. On all those shifts in the 19 months and all the different houses, did you ever see a nurse perform the basic everyday functions you, as an aide, perform for the residents?  
A. No.  
Q. Same question for the quality of life coordinator, did you ever see them come and perform those functions in the 19 months, on all the different shifts and all the different houses.  
A. No.  
Q. Same thing for the business coordinator. You ever see her do that?



A. When she was –

Q. When she was serving as a business coordinator.

A. Oh, no.

Q. And diet – diet tech, did you ever see them perform those functions –

A. No, sir.

Q. --in the 19 months and all the different houses?

A. No.

(Cain Tr. 336-338)

The Elder Assistants are self-scheduled. (Cain, Tr. 312) The Elder Assistants attend meetings at their house approximately every two weeks or monthly to discuss common issues with the other Elder Assistants in the house. (Cain Tr. 311-312, Turner Tr. 349) The Coach sometimes attends. It is rare for any of the other classifications to attend and they only attend if they have something specific they want to present. (Cain Tr. 311-312; Turner Tr. 349)

The majority of the Elder Assistants earn less than \$10.00 per hour and only two Elder Assistants earn as much as \$13.00 dollars per hour. (P. Ex. 2) The Business Office Coordinator earns \$12.53 per hour, the Diet Techs earn \$16.85 per hour, and \$15.25 per hour respectively, the LPNs earn anywhere from \$15.80 per hour to \$19.43 per hour, and the RNs earn \$22.00 per hour and \$25.00 per hour. (P. Ex. 2) The Housing Coordinator earns \$26.44 per hour, and the Quality of Life Coordinator earns \$14.00 per hour. (P. Ex. 2) Another way to grasp the huge disparity in pay between the Elder Assistants and the other classifications is to review Petitioner's Exhibit 8. The diet tech earns over \$35,000.00 per year at only 1.9 years of service. The Business Coordinator earns over \$26,000.00 with only 2 years of service. LPN Rehkla, who testified on behalf of the employer, will make almost \$36,000.00 per year and she only has four months of service. The RNs are in the \$45,000.00 and \$52,000.00 annual salary range. (P. Ex. 8)

When Elder Assistants are hired, they receive orientation specific to their duties as do the other classifications. (McConn Tr. 86) The Elder Assistants shadow other Elder Assistants for the beginning period of their employment. (McConn Tr. 90) When nurses are hired, they go through an orientation specific to their duties as nurses, and they shadow other nurses for the first period of their employment. (McConn Tr. 89-90) Neither the nurses nor any other classifications at issue, cook the elders' food, serve meals to the elders, do the laundry, mopping, cleaning, cutting nails, brushing of hair, brushing of teeth, or performing any such basic duties. (Cain Tr. 309-310) The Elder Assistants obviously perform none of the major duties of the nurses. They do not distribute medication, they do not maintain the charts of the elders, and they do not communicate with the physicians. The nurses are in charge of the medical care. (McConn Tr. 86-89; Starky Tr. 217)

B. The Nurses.

Local 75 does not dispute that the nurses at issue, both RNs and LPNs, both perform essentially the same job. The nurses maintain the elders' charts, provide medical treatment, give injections, and distribute medication. It is the nurses who communicate with the elders' physicians. (McConn, Tr. 86-89; Starky, Pr. 217; Rehklau Tr. 281) The RN/LPN job description provided by Avalon consists of job duties and tasks that are key. (E. Ex. 5 p. 3) The Elder Assistants do not share the key duties and tasks in the nurse job description.

The nurses have their own monthly meetings and receive at least 2 years of post high school education to receive either an LPN or an RN degree. (Rehklau Tr. 296-298) They then

must take a national licensure exam. (Curavo Tr. 256-258; Rehklau Tr. 296-297) Nurses interview with Karen Dean, the Director of Nursing, before being hired. (Rehklau Tr. 300) Ms. Dean supervises and evaluates the nurses. (Starky Tr. 216) In Ms. Rehklau's case, a 90 day employee, she received her orientation from Business Coordinator, Lindsay Crompton. (Rehklau Tr. 301-302)

A nurse is in each of the five buildings approximately every two hours. During that time, in addition to providing medical care for the elders, the nurse is charting and putting away medication.

Despite the company's claims to the contrary, the nurses do not eat with the elders at the communal table in each house. (Cain Tr. 313) It is the Elder Assistants who eat the meals with the residents, after they have cooked the meals and after they have served the meals.

C. The Business Coordinator.

Lindsay Crompton is the Business Coordinator. The company claims she is also an Elder Assistant. A review of the schedules indicates that she rarely has served as an Elder Assistant. (P. Exs. 3-7) Ms. Starky testified that Ms. Crompton functions as the human resource person, and works 40 hours per week in that position. (Starky Tr. 209-210) The 40 hours of work per week are not at the Avalon Monclova facility. Twenty hours of work per week are at a facility in Perrysburg, and 20 hours are at the Monclova (Avalon) facility. (Starky Tr. 209-210) The Business Coordinator, Ms. Crompton, conducts orientations, maintains the personnel files and receives confidential medical information. She also does the payroll. (McConn Tr. 102-104;

Starky Tr. 210) It is Ms. Crompton who is the link between Ms. Starky and the Elder Assistants. (Starky Tr. 222-223; E. Ex. 7, p. 3, Key Duties and Tasks) She is the one that provides the support and follow through on unemployment issues and she maintains the attendance and charting system. She is the eyes and ears of Ms. Starky. Ms. Crompton rarely has any interaction with the Elder Assistants or for that matter, probably the elders. Any communication between the Elder Assistants and Ms. Crompton, the Business Coordinator, is usually by email. (Cain Tr. 318) Ms. Crompton is directly supervised and evaluated by the Administrator/Guide, Cynthia Starky. (McConn Tr. 123-124; Starky Tr. 214-215)

D. Housing Coordinator.

The Housing Coordinator is a social worker. Jan Madden is the admissions person and social worker. (Starky Tr. 218) She has a four year college degree. (Starky Tr. 211) She makes \$26.44 per hour. (E. Ex. 1) She, like all the other classifications other than Elder Assistants, is not assigned to one specific house. Her contact with the Elder Assistants is minimal. Ms. Madden is supervised by Cynthia Starky and evaluated by Cynthia Starky. (Starky Tr. 215-216) As Ms. Madden's job description indicates, she has none of the same duties as the Elder Assistants. (E. Ex. 9) She is considered an exempt employee for FLSA purposes. (E. Ex. 9)

E. Diet Techs.

The dietary techs, like all the other classifications (except the Elder Assistants) do not work all three shifts. They move from house to house and report to Cynthia Starky. Cynthia Starky fills out their evaluations. The dietary techs have two year associate degrees. (Starky Tr. 212) The dietary techs simply oversee the menu and nutrition of the elders, but

again, there is minimal contact with the Elder Assistants. The Diet Techs make \$15.25 per hour and \$16.85 per hour. (P. Ex. 2) A review of their key duties and tasks establishes that they perform none of the job functions of the Elder Assistants. (E. Ex. 6)

F. Quality of Life Coordinator.

The Quality of Life Coordinator is an activities coordinator. It is her job to provide and plan activities for the elders. Of all the classifications at issue, she probably has the most contact with the Elder Assistants. As the Quality of Life Coordinator job description provides, it is her job to essentially provide activities for the elders. It is the Quality of Life Coordinator who is also responsible for recruiting, interviewing, hiring, assigning and directing all volunteers. (E. Ex. 8 p. 3) Again, any contact between the Elder Assistants and the Quality of Life Coordinator is minimal and sporadic. The Quality of Life Coordinator is supervised by Cynthia Starky. (Starky Tr. 215) She is considered an exempt employee for FLSA purposes. (E. Ex. 8)

**ARGUMENT**

A. The Petitioned For Unit Is Appropriate.

It is clear under Board law that the petitioned for unit need only be appropriate. The unit does not have to be the most appropriate unit. See, Dezcon, Inc. 295 NLRB 109, 111 (1989); P. J. Dick Contracting, Inc. 290 NLRB 150 (1988).

Here, the petitioned for unit includes all full time and regular part time Elder Assistants and housekeeping at the 5069 Otterbein Way Facility, excluding all professional employees, office and clerical employees, maintenance, per diem, supervisors and guards as defined in the Act.

The analysis for determining the appropriateness of a bargaining unit in a facility such as Avalon is through the Empirical Community of Interest Test. See, Park Manor Care Center, 305 NLRB 872 (1991)

Local 75 has petitioned for housekeeping (one employee), and the Elder Assistants (nurse aides). The Elder Assistants all have the same required education, a two week course (60 hours) and 16 hours of clinical. (Rehklau Tr. 297, Cain Tr. 308) Additionally, a short state exam must be passed. The Elder Assistants perform the same duties, which include housekeeping, cooking, and care of the elders. The Elder Assistants never fill in for any of the other job classifications and none of the other job classifications fill in for the Elder Assistants. (Starky Tr. 207-209) The Elder Assistants all have essentially the same rate of pay in the \$9.40 to \$13.00 an hour range. The Elder Assistants all have the same supervisor, Gene Eddy, who has the title of Coach. The Elder Assistants all are assigned to one specific building, and they do not rotate during their shift from one building to another building. (Curavo Tr. 253) The Elder Assistants all have the same job description. (E. Ex. 4) When hired, the Elder Assistants after orientation must shadow another Elder Assistant for training. (McConn Tr. 89) There is absolutely no cross training between the Elder Assistant job classification and the other job classifications. (McConn Tr. 92)

B. The Community Of Interest Between The Elder Assistants And The Nurses.

In Madeira Nursing Center, Inc. 203 NLRB 323 (1973), the union's requested unit of employees excluded the LPNs and RNs. The union requested a unit of nurses aides, orderlies, housekeeping employees, maids, cooks and kitchen employees at the Madeira, Ohio nursing home. Madeira was divided into three operations: nursing or patient care, housekeeping, and

dietary. The Board noted that the RNs and LPNs' duties related to patient care such as administering medication and communicating with the physicians. In considering the duties of the aides and orderlies, the regional director found:

The aides and orderlies are involved primarily in the environmental care of patients; i.e., making their beds, tidying their rooms, bathing them and assisting them in dressing, feeding and moving about. They may also be given direct nursing duties such as taking temperatures. When dictated by the condition of a patient, nurses also direct aides and orderlies to assist in medical treatments. (Id. at 324)

The Board held that the nurses should be excluded from the bargaining unit. In reaching its decision, the Board relied on a number of factors, including the educational requirements to become LPNs, and the fact that the nurses themselves had a substantial community of interest distinct from the broader interest they shared with the other nursing home employees.

Of similar effect is the case of Lincoln Park Nursing and Convalescent Home, Inc., 318 NLRB 1160 (1995). In the Lincoln Park case, the Regional Director found that the appropriate petitioned for unit which included nurse aides properly excluded the licensed practical nurses. The employer requested a review of the Regional Director's decision in considering the community of interest between the licensed practical nurses and those included in the unit.

The Board excluded the nurses from the unit and citing its previous decision in Hillhaven Convalescent Center, 318 NLRB No. 105 (1995), held:

In *Hillhaven Convalescent Center*, the Board recently addressed the issue of whether technical employees, consisting of LPNs and a physical therapy assistant, may be excluded from the otherwise overall nonprofessional unit found appropriate at the employer's nursing home. Applying *Park Manor* to the particular facts in that case, the Board found that the technical employees could be excluded from the unit. In *Hillhaven*, the Board relied on the specialized skills and license which permitted technicals to perform distinct functions, the wide wage gap between the LPNs and certified nursing assistants, and the adequate size of the technical unit.

We find that under *Hillhaven*, the LPNs in the instant case were properly excluded from the unit. Here, the LPNs, unlike the aides with whom they work, have specialized training which permits them to perform distinct functions involving the use of independent judgment and requiring specialized educational training and skills. There is a wide wage gap between the LPNs and aides, and the LPNs constitute a sizable group of technicals (approximately 38 LPNs). In *Hillhaven*, the LPNs had some overlapping duties with certified nursing assistants such as assisting patients with hygiene and dress, taking temperatures and blood pressure, assisting patients to get out of bed and transfer to wheelchairs, etc. In this case, there is no evidence that LPNs perform some of the less skilled tasks that aides perform. Nor is there evidence here of cross-training of LPNs and aides, as there was in *Hillhaven*. On the contrary, the duties of the LPNs are almost identical to those of RNs, who also serve as wing nurses. Under these circumstances, the factors favoring the exclusion of LPNs from the nonprofessional unit found appropriate are even stronger than in *Hillhaven*. (Id. At 1161-1162) (citations and footnotes omitted)

A case which is almost directly on point involves the recent (March 10, 2010) Region 12 Director's Decision and Direction of Election in the case of SCG Laurellwood, LLC dba Laurellwood Nursing Center and United Food and Commercial Workers International Union Local 1625, Case 12-RC-9397 (copy attached). Laurellwood Nursing Center is located in St. Petersburg, Florida. The union petitioned for a unit composed of certified nursing assistants (CNAs), restorative aides, central supply clerks, and the CNA/activity assistant. The employer sought a broader unit to include the LPNs and activity assistants. Regional Director Kentov noted that the CNAs provided direct care to the residents such as grooming and bathing the residents. The CNAs helped the non ambulatory residents move about and they assisted the residents with eating. The CNAs also assisted with nursing functions, including measuring and recording vital signs, collecting specimens, and maintaining accurate records for hydration. The CNAs also prepared the residents' meals and recorded the residents' food and fluid intakes.

The Director found that the nurses administered medications, and provided treatment and were the employees who received and transcribed physician orders. The LPNs made frequent rounds to monitor the residents' conditions and provided direct care. The LPNs had to be



licensed by the State of Florida and complete at least a one year course of study. The LPNs' starting rate of pay was \$18.00 per hour. The Director noted that on occasion, when a CNA called in sick, an LPN would be assigned CNA duties. (At Avalon nurses never fill in for Elder Assistants).

The Director found that the LPN and CNAs had many of the same conditions of employment such as both groups were covered under the same employee handbook and eligible for the same insurance. They all were subject to the same paid time off policy.

In addition, Director Kentov considered factors such as common supervision, similarity in skills and functions, similarity in the scales determining earnings, similarity in benefits and working conditions, contact among employees, the degree of functional integration, interchange, geographic proximity, and the history of any collective bargaining involving the parties. (Id at 12) The Director found that the CNAs, restorative aides and central supply clerks comprised an appropriate unit and that a unit of LPNs would comprise another appropriate unit.

Director Kentov stated that LPNs had to be high school graduates and had to be licensed in the State of Florida, had to complete at least a one year course of study and pass an exam, and they performed significant patient care duties. The CNAs were not permitted to perform nursing duties such as administering medications. (Id. at 14) The LPNs had access to the medical supply room, which the CNAs did not. (This is also the case at Avalon) The fact that CNAs charted ADLs supported keeping nurses out of the unit.

The Director reasoned:

The fact that CNAs unlike LPNs document activities of daily living underscores that their focus is in the residents' daily routines while the fact that LPN chart nurses notes shows that they focus on the residents' medical conditions. The CNA is required to perform functions such as making beds, providing snacks, assisting with nail care, shaving and hair care and making sure mouth care is done upon rising, after meals and at bedtime. The evidence does not establish that LPNs routinely perform such duties. (Id at 14)

In the case of sub judice, the nurses never perform the Elder Assistant duties. The Elder Assistants never perform the nursing duties. There is no common supervision. The nurses report to Director of Nursing Karen Dean and the Elder Assistants report to a Coach, Gene Eddy. The nurses are evaluated by the Director of Nursing, Karen Dean, and the Elder Assistants are evaluated by Gene Eddy, the Coach. Elder Assistants are assigned to one particular building and do not rotate between the buildings during their shift. The nurses rotate between the buildings. The nurses attend their own department meetings run by Karen Dean, the Director of Nursing. The Elder Assistants attend meetings approximately twice a month in their particular building in which they attend, sometimes their Coach Gene Eddy attends, and once in awhile somebody from another department will attend if they have something to present.

The entry of ADLs just as in Laurellwood, does not create a community of interest with the nurses. At any type of nursing home, nurse assistants almost always have charting responsibilities.

Finally, there are eight nurses (six LPNs and two RNs) performing the same function. They are certainly able to form their own bargaining unit.

C. The Community Of Interest Between The Other Classifications (Housing Coordinator, Diet Techs, Quality Of Life Coordinator, Business Coordinator) And The Elder Assistants.

There is no significant community of interest between the Housing Coordinator (social worker) and the Elder Assistants. Any interaction is limited. She is not assigned to one specific

building. She has a bachelor's degree in social work. (Starky Tr. 211) She receives more than \$26.00 per hour for her work, more than twice the average rate for the highest paid Elder Assistant. (P. Ex. 2) The Housing Coordinator never fills in for the Elder Assistants and the Elder Assistants never fill in for the Housing Coordinator. (Starky Tr. 207-208) It is clear from her job description that she has none of the same job duties as the Elder Assistant. (E. Ex. 9) The Housing Coordinator is supervised by Cynthia Starky, the nursing home Administrator. She is evaluated by Cynthia Starky. The Housing Coordinator fills in as a social worker for the facility and is essentially the admissions counselor for the facility. (Starky Tr. 218-219) There is no functional integration, common supervision, cross training, or any other main factor that would establish a community of interest between the college educated Housing Coordinator (social worker) and the Elder Assistants. It is the Housing Coordinator who works with MDS Nurse Curavo to manage cases. (Curavo Tr. 278)

Moreover, if the Housing Coordinator (social worker) is excluded from the bargaining unit, she would not become the only unrepresented employee. She would always have the future opportunity to be included in a bargaining unit consisting of the Business Coordinator, herself, Diet Techs, the Quality of Life Activities Coordinator, and even the Nurses.

The Diet Techs have no community of interest with the Elder Assistants. The pay rate is far superior to that of the Elder Assistants, they have different supervision, and they perform different tasks. (P. Ex. 2) There is no cross training between the Elder Assistants and the Diet Techs. The Diet Techs never fill in for the Elder Assistants and the Elder Assistants never fill in for the Diet Techs. The Diet Techs have specialized training to perform their jobs. A cursory review of the Diet Techs' job description as drafted by the employer establishes their duties are completely different than those of Elder Assistants. (E. Ex. 6)

The Quality of Life Coordinator (Activity Director) probably has the most in common with the Elder Assistants of the groups the employer seeks to include in the bargaining unit. The hourly rate far exceeds Elder Assistants but is the closest of all the classifications to the Elder Assistants. She is in charge of activities for the elders and at least on one occasion came to one of the houses to do a puzzle with an elder. She is directly supervised and evaluated by Cynthia Starky.

The Business Coordinator has absolutely no community of interest with the Elder Assistants. Although she is listed as a Business Coordinator/Elder Assistant, she does not perform the Elder Assistant job. A review of the schedules for Elder Assistants shows that at most she has worked a couple of shifts in the last three months as an Elder Assistant. (Starky Tr. 206; P. Exs. 3-7) Cynthia Starky noted that the Business Coordinator, Lindsay Crompton, performs the human resource function for not only the Monclova Avalon facility but also for a Perrysburg facility. (Starky Tr. 209-210) She is directly supervised by Cynthia Starky. She is evaluated by Cynthia Starky. (McConn Tr. 123-124, Starky Tr. 214-216)

She receives confidential employment information such as employee medical records, employee evaluations, and she, according to Cynthia Starky, is the one responsible for human resources. (McConn Tr. 102-104; Starky 209-210) She essentially serves as an assistant to Cynthia Starky and should be excluded from the unit as a confidential employee. See, NLRB v. Meenan Oil Company, 139 F. 3d 311 (2<sup>nd</sup> Cir. 1998) In sum, Lindsay Crompton has no community of interest with the Elder Assistants that would be sufficient to include the Business Coordinator in the petitioned for unit. Moreover, she should be excluded as a confidential employee under the National Labor Relations Act.

## CONCLUSION

At the hearing, the employer emphasized that nurses could not do their jobs without the Elder Assistants. Terms such as interface and observation were used to describe the interrelationship between the Elder Assistants and the Nurses.

There is no dispute that the Elder Assistants do their best to care for the elders. If they “observe” something that needs the nurses’ attention, they certainly report same. This does not create a community of interest.

Local 75 does agree that observations are important. As the great American philosopher Yogi Berra noted: “You can learn a lot by observing.” It is beyond peradventure that an objective observation of the record reveals:

1. The Elder Assistants make significantly less per hour than the nurses or the other classifications the employer is seeking to include in the unit;
2. The Elder Assistants are supervised and evaluated by Gene Eddy, who has the title of coach, the nurses are supervised by the Director of Nursing, Karen Dean, and the other classifications the employer seeks to include are supervised by the Guide (Home Administrator, Cynthia Starky);
3. The Elder Assistants’ major function is to provide basic care to the elders such as cooking, cleaning, and grooming. Neither the nurses nor any of the other classifications the employer seeks to add in the unit perform these duties;
4. There is no cross training between classifications;
5. The Elder Assistants require 60 hours of classroom work and 16 hours of clinical work to become STNAs, the nurses complete a two year course of study and the other classifications all have either associates degrees or similar degrees;

6. The Elder Assistants spend their entire shift in one particular house and the other classifications are not assigned to one particular house, indeed, the Business Coordinator is not even assigned to one particular location, as she performs 20 hours per week at the Monclova location and 20 hours per week of her work at the Perrysburg location;
7. Two Elder Assistants testified on behalf of the union, Tamara Turner, who has worked in several of the different buildings on both second and third shift, and Joyce Cain, who has worked at all of the buildings on all the different shifts. Ms. Cain has been with Avalon for 19 months and Ms. Turner has been with Avalon for 17 months;
8. Ms. McConn testified for the employer. She is the vice president of Avalon and she testified that she regularly visits the Monclova location. She later testified that she visits the Monclova location two to three times a month;
9. Cynthia Starky (the Guide/Nursing Home Administrator) testified on behalf of Avalon. She has been with Avalon for one year;
10. Marcia Curavo testified for Avalon, she is the MDS nurse and she just completed her probationary period and has been with Avalon for 90 days;
11. Finally, Emily Rehlau testified for Avalon. She also has just finished her probationary period and she has been an LPN with Avalon for 90 days;
12. No one in the classifications of Business Coordinator, Quality of Life Coordinator, Diet Techs, or Housing Coordinator testified.
13. The key duties and tasks in the job description for the Nurses, Diet Technicians, Business (office) Coordinator, Quality of Life Coordinator and Housing Coordinator are not similar to the main duties performed by the Elder Assistants. (E. Exs. 4-9) Indeed,

the Elder Assistants do not have Key Duties and Tasks listed in their job description. (E. Ex. 4)


The union respectfully submits that an observation of the record and case law establishes that the appropriate bargaining unit is exactly the bargaining unit petitioned for by Local 75 and a direction of election should be issued in the petitioned for unit.

Respectfully submitted,

  
\_\_\_\_\_  
Ronald Rahal

CERTIFICATE OF SERVICE

This is to certify that a copy of UFCW Local 75's Post Hearing Brief was served by electronic mail on counsel for the Employer, Bruce Petrie, Jr., this third day of May, 2010.

  
\_\_\_\_\_  
Ronald Rahal

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

SCG LAURELLWOOD LLC, d/b/a  
LAURELLWOOD NURSING CENTER<sup>1</sup>

Employer

and

Case 12-RC-9397

UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
LOCAL 1625

Petitioner

**DECISION AND DIRECTION OF ELECTION**

SCG Laurellwood LLC, d/b/a Laurellwood Nursing Center (the Employer) operates a nursing home in St. Petersburg, Florida.<sup>2</sup> The Petitioner, the United Food and Commercial Workers International Union, Local 1625 (the Union), seeks to represent a unit composed of the Employer's full-time and regular part-time certified nursing assistants (CNAs), restorative aides, central supply clerks, and the CNA/activity assistant.<sup>3</sup> The Employer contends in its brief that an appropriate unit must be a "wall-to-wall unit of all nonprofessional employees,"

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> The parties stipulated that the Employer is a Florida corporation operating a nursing home located at 3127 57<sup>th</sup> Avenue North, St. Petersburg, Florida, and that during the past 12 months, it has derived gross revenues exceeding \$100,000, and has purchased and received at its St. Petersburg facility goods valued in excess of \$50,000 directly from points located outside the State of Florida.

<sup>3</sup> The record includes a job roster prepared by the Employer. According to the roster, the job title of the restorative aide is "CNA restorative aide," and the job title of the central supply clerk is "CNA/central supply clerk. Although the Union did not expressly state its desire to include the CNA/activity assistant, the record reflects that the Union seeks to include all CNAs, and it appears from the record that the Union seeks to include the CNA/activity assistant. This is supported by the parties' agreement at the hearing that there are 34 CNAs; without the CNA/activity assistant, there would only be 33 CNAs. .



thus also including all full-time and regular part-time licensed practical nurses (LPNs),<sup>4</sup> and both activity assistants. The unit sought by the Union has approximately 34 employees,<sup>5</sup> while the unit proposed by the Employer adds 11 LPNs<sup>6</sup> and one activity assistant.

A hearing officer of the Board conducted a hearing, and both parties submitted briefs. I have considered the evidence and arguments presented by the parties.<sup>7</sup> As explained below, I conclude that the unit sought by the Union comprises an appropriate unit within the meaning of Section 9(b) of the Act, with the modification that the employee holding the position of "activity assistant" may vote subject to challenge.

After setting forth a brief overview of the Employer's facility and supervisory structure, I will summarize the relevant facts regarding the positions at issue, and then apply the controlling Board principles.

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<sup>4</sup> The Union seeks to include CNAs referred to by the Employer as "pool" CNAs. The Employer does not dispute their inclusion, but contends that an appropriate unit must also include pool LPNs. Pool CNAs and LPNs are discussed in the body of my Decision.

<sup>5</sup> This includes the pool CNAs, as well as the central supply clerk and the restorative aide, each of whom is also a CNA, and a CNA who also works as an activity assistant.

<sup>6</sup> This includes the pool LPNs.

<sup>7</sup> In its brief at pp. 2-3, the Employer asserts that the Union seeks to include maintenance employees. Although the Union initially included maintenance employees in its petition, the record reflects that the Union amended this aspect of its petition at the hearing, and Board Exhibit 2, a Stipulation signed by the parties, clearly states that maintenance employees are excluded. The Stipulation lists the positions to be excluded as: "all other employees, registered nurses, maintenance employees, office clerical employees, guards, and supervisors as defined in the Act." Also in its brief, at p. 3, the Employer asserts that the Union seeks to include the activity assistant. It appears from the record that the Union seeks to only include the position that the Employer titles, "CNA/activity assistant," and not also the position that the Employer titles, "activity assistant." However, the record is not clear on this point, and as explained below, I conclude that the "activity assistant" may vote subject to challenge.

## 1. FACTS

### *Overview*

The Employer's facility has 51 beds divided into two units. One unit, with approximately 22-23 beds, is referred to as the "rehab unit." This unit provides physical, speech and occupational therapy for residents who are generally at the facility on a short-term basis. The other unit has 28 beds and provides long-term care for residents. Each unit has a nurses station. Medications for residents in both units are stored in a room behind one of the nurses stations. There is one kitchen and dining room for all residents.<sup>8</sup> The facility operates in three shifts: 7:00 a.m. until 3:00 p.m. (the day shift), 3:00 p.m. until 11:00 p.m. (the evening shift), and 11:00 p.m. until 7:00 a.m. (the night shift). The Employer considers as "full-time" any employee working 32 hours per week or more.

The Director of Nursing has supervisory authority over the nursing department, including the unit manager.<sup>9</sup> The Director of Nursing testified that the LPNs and CNAs report to the unit manager and to her.<sup>10</sup> The Director of Nursing further testified that there is one registered nurse on duty for each

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<sup>8</sup> The Union in its brief states that the Employer subcontracts all dietary, housekeeping, and laundry positions. The record reflects that the Employer has a dietary department, but the record does not reflect whether dietary employees work for the Employer or a subcontractor.

<sup>9</sup> There is just one unit manager, who supervises both units.

<sup>10</sup> At the hearing, the parties stipulated, and I find based upon the record as a whole, that the following positions are excluded because they exercise supervisory authority within the meaning of Section 2(11) of the Act: Administrator Jacque Shirley; Director of Nursing Veronica Spears; Director of Activities Beverly James; Director of Social Services Jeremiah Mincey; Director of Maintenance (position currently vacant); Human Resources Payroll Manager Marilyn Johnson; Unit Manager Teresa Worthington; and Staffing Coordinator and Admissions Coordinator Levika Garcia. The parties also stipulated, and I find based upon the record as a whole, that the medical records secretary and MDS coordinator, Linda Long, is excluded as an office clerical employee.

evening shift, and one registered nurse on duty for the day shift on weekends.

The parties agree that RNs are excluded from the unit.<sup>11</sup>

### ***Job Duties and Contact of CNAs and LPNs***

The Director of Nursing testified that CNAs<sup>12</sup> provide direct care for residents, such as bathing, dressing, grooming, and toileting. They assist residents with eating and transfer residents who are not ambulatory from bed to chair, toilet, dining room, and any activities. CNAs also accompany residents to doctor appointments outside the facility.

According to the Employer's position description for certified nursing assistant, the "essential functions" of a CNA begin with a list of duties under the heading, "[a]ssists with resident/patient care needs and comforts..." The listed duties include: "assists with bathing functions and dressing/undressing as necessary;" "keeps residents/patients dry when [they] become soiled or wet;" "assists with nail care, shaving, and hair care;" "assists with lifting, turning, positioning, and transporting residents;" "makes both occupied and unoccupied beds;" "assists resident/patient with bowel and bladder functions;" and "answers call lights promptly."<sup>13</sup>

The CNAs' "essential functions" also include a list entitled, "[a]ssists with nursing functions..." The listed duties include: "measures and records vital

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<sup>11</sup> It appears from the record that the evening shift RN and the weekend night shift RN exercise supervisory authority over LPNs and CNAs. However, the parties did not specifically address this issue.

<sup>12</sup> As noted above, all of the employees the Union seeks to represent are CNAs, although some have additional job titles as well.

<sup>13</sup> The Director of Nursing testified that "everyone" is responsible for answering call bells, that whoever is closest to the room where the call bell rings is supposed to respond, and that if the resident requires toileting or assistance that only nursing personnel can provide, both CNAs and LPNs respond.

signs;" "weighs and measures residents/patients;" "collects specimens (i.e., urine, stool, sputum);" "turns bedfast residents/patients at least every 2 hours;" "maintains accurate records of hydration and nutrition offerings on residents identified at risk for malnutrition/ dehydration." The CNAs' "essential functions" further include a list under the heading, "[p]erforms food service functions..." The listed duties include: "prepares residents/patients for meals (i.e. take to bathroom, wash hands, oral care, take to, from dining room, etc.);" "serves food trays;" "serves between meal and bedtime snacks;" "performs after meal care (i.e., clean residents/patients hands, face, clothing, brush teeth, take to bathroom, etc.);" and "records the resident's/patient's food and fluid intake on meal consumption record."

The record includes a one-page document entitled: "C.N.A. Expectations." Listed expectations include walking rounds at shift change,<sup>14</sup> making sure male residents are shaved daily on the day shift, making residents' beds by 10:30 a.m., keeping residents' finger nails clean and filed, making sure mouth care is done upon rising, after meals, and at bed time, ensuring that ADL (Activities of Daily Living) books are 100 per cent completed before leaving the facility,<sup>15</sup> ensuring that residents sit in assigned seats at meals, and keeping bed pans clean.

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<sup>14</sup> The Director of Nursing testified that this involves walking from bed to bed with the CNA coming on duty who is assigned to those beds, and reporting on each resident's condition, and any required changes in care, etc.

<sup>15</sup> The Director of Nursing testified that CNAs use ADL sheets to document any assistance provided to the resident in dressing and grooming, bowel habits, food and fluid intake, etc.

There are no minimum educational requirements for the CNA, except that she must be certified by the State of Florida, which requires completing a 32-hour class and passing an exam.<sup>16</sup> CNAs are paid hourly, starting at \$10 per hour.

The Director of Nursing testified that LPNs administer medications,<sup>17</sup> provide treatment,<sup>18</sup> receive and transcribe physician orders to patient charts, chart nurses' notes to reflect the care provided and the resident's response, give nursing reports to relief LPNs at shift change,<sup>19</sup> and assure that charges are accounted for on all chargeable items.

According to the Employer's position description, the essential functions of the LPN also include making frequent rounds to monitor the residents' conditions, providing direct resident care, recording and reporting to the appropriate person any symptoms, reactions, and changes in the resident's condition, reviewing care plans daily to ensure that appropriate care is given, keeping the physician informed of the resident's condition,<sup>20</sup> following locked medication room<sup>21</sup> and medication cart policies and procedures, and participating in Interdisciplinary Plan of Care (IPOC) meetings as requested.<sup>22</sup>

The LPN must be a high school graduate. In addition, the LPN must be licensed by the State of Florida, for which the LPN must complete a one-year

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<sup>16</sup> The certification must be current.

<sup>17</sup> The Director of Nursing testified that day shift LPNs administer medications at 9:00 a.m., noon, and 2:00 p.m., and that evening and night shift LPNs also administer medications, with most of the night shift medications given at 5:00 a.m.

<sup>18</sup> This includes treating wounds and respiratory treatment.

<sup>19</sup> The Director of Nursing testified that the report procedure for LPNs is similar to that for CNAs, and that the two procedures occur separately.

<sup>20</sup> It appears from the record that CNAs do not have direct communication with doctors.

<sup>21</sup> LPNs have access to the room where medications are stored. CNAs do not.

<sup>22</sup> The Director of Nursing acknowledged that CNAs do not measure drug dosages, administer medication, provide respiratory treatment, receive and transcribe physician orders, chart nurses notes, or assure that charges are accounted for on chargeable items.

course of study and pass an exam. LPNs must also have current CPR certification. LPNs must have experience in giving medications effectively and efficiently during federally mandated time frames. LPNs are paid hourly, starting at \$18 per hour.

The Director of Nursing testified that LPNs and CNAs are in constant contact throughout their shift, and that LPNs assist CNAs several times per day with feeding,<sup>23</sup> transferring, dressing, bathing, and toileting residents. She further testified that CNAs occasionally assist LPNs as by positioning a resident while the LPN dresses a wound.

The Director of Nursing also testified that at the beginning of each shift, the LPN and the CNA confer with one another after receiving report on their assigned residents to discuss any special needs a resident may have.<sup>24</sup> However, she acknowledged that CNAs going off duty report to CNAs coming on duty, and similarly for LPNs.<sup>25</sup>

The Director of Nursing testified further that CNAs complete ADL sheets toward the end of their shift at the nurses station, and that LPNs do their charting at the nurses station as well.<sup>26</sup>

The record does not reflect what duties, other than those of a CNA, are performed by the CNA restorative aide, CNA/central supply clerk, and CNA/activity assistant.

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<sup>23</sup> For example, when CNAs are busy assisting residents who eat in the dining room, LPNs assist in feeding residents who cannot leave their rooms.

<sup>24</sup> For example, if a resident ran a fever on the preceding shift, the LPN coming on duty would instruct the CNA coming on duty to take that resident's vital signs periodically.

<sup>25</sup> For example, the LPN going off duty would report to the LPN coming on duty that a resident's doctor had been called about a change in the resident's condition, and report what the doctor said.

<sup>26</sup> The record does not reflect whether LPNs do so at the end of their shift.

### ***Staffing and Interchange***

The Director of Nursing testified that, in general, the Employer uses two LPNs and five to six CNAs on the day shift,<sup>27</sup> one LPN, one RN, and four to five CNAs on the evening shift,<sup>28</sup> and two LPNs and three to four CNAs on the night shift. On weekends, the Employer generally uses two LPNs, three to four CNAs, and one RN per shift.<sup>29</sup>

The Staffing Coordinator prepares "Daily Staffing Projection/Assignment Sheets" (staffing sheets), which list LPNs and CNAs on duty for a given shift. The Director of Nursing and the unit manager then determine the beds to be assigned to each LPN and CNA on the basis of the census, or number of occupied beds. The Employer divides the number of occupied beds by the number of CNAs to determine how many beds to assign to each CNA. The group of beds assigned to a CNA is referred to as a "set." It appears from the record that CNA assignments are determined solely by the census, rather than the particular acuity of the resident.<sup>30</sup>

If a CNA is on leave or calls off sick, the Employer seeks to replace her from a pool of CNAs who work as needed. It appears from the record that the same procedure is followed when an LPN calls off. The Director of Nursing testified that pool CNAs and pool LPNs are compensated on a per diem basis. They receive \$2 per hour more than the regular rate for the position (i.e. \$12 per

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<sup>27</sup> One LPN is assigned to each unit.

<sup>28</sup> On weekdays, this RN is assigned to the rehab unit.

<sup>29</sup> The weekend RN only works during the day and evening shifts.

<sup>30</sup> Each CNA is assigned to one set on each shift. The number of residents in her set depends upon the census. CNAs rotate from one set to the next, although the record does not reflect how frequently they rotate between sets.

hour to start for per diem CNAs and \$20 per hour to start for per diem LPNs).

Pool employees do not receive benefits.<sup>31</sup>

The Employer is required to provide one LPN for 40 occupied beds.<sup>32</sup>

When the census falls below 40, if two LPNs have been scheduled, the Director of Nursing occasionally assigns the second LPN to perform the duties of a CNA. An LPN assigned to CNA duties does not administer medications or perform other LPN functions, such as wound treatment; her LPN duties are instead performed by the other LPN.<sup>33</sup> The Director of Nursing testified that about once every two weeks, an LPN on the night shift performs CNA duties because the census falls below 40. The Director of Nursing further testified that an LPN is assigned CNA duties when a CNA calls in sick and the Employer is unable to procure a substitute from its pool of CNAs. The Director of Nursing testified that this occurs about twice a month, mainly on weekends. CNAs cannot substitute for LPNs.

The record contains the staffing sheets for eight days from November 18, 2009, to January 12, 2010. Each of these eight staffing sheets shows that an LPN worked as a CNA on the night shift, and that the census was 40 or less.<sup>34</sup> The number of hours that the LPN worked as a CNA varies from three and one-quarter to eight. These staffing sheets also reflect that four different LPNs worked as CNAs on these eight nights.<sup>35</sup>

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<sup>31</sup> Both parties agree that the eligibility of pool employees should be determined pursuant to Sisters of Mercy Health Corp., 298 NLRB 483 (1990) (employees who average four hours or more per week during the calendar quarter preceding the eligibility date).

<sup>32</sup> Thus, when the census reaches 41, the Employer must have two LPNs per shift.

<sup>33</sup> It appears from the record that when performing CNA duties, LPNs are paid their normal rate.

<sup>34</sup> On one night shift, a CNA called off sick.

<sup>35</sup> The four LPNs were: E. Garcia, K. Greene, E. Cannedy, and D. Devine.



Additionally, the Director of Nursing testified that "quite often," the Employer's CNAs have become LPNs using the Employer's tuition assistance program. The record does not reflect further information about the frequency of such promotions.

The record does not reflect any occasions when an LPN has performed as a CNA restorative aide, CNA/central supply clerk, or CNA/activity assistant.

CNAs are not used as substitutes for absent LPNs.

### ***Additional Terms and Conditions***

LPNs and CNAs use the same time clock, break room,<sup>36</sup> and bulletin board. They must provide and wear scrubs, although the Employer does not require any particular color.<sup>37</sup> LPNs and CNAs have separate ID badges.

All employees are governed by the Employer's Handbook. As set forth in the Handbook, all employees are subject to the same driver's license background check and fingerprinting policy, and all serve a 90-day probation. All employees receive annual evaluations on their anniversary dates, and these evaluations determine raises.<sup>38</sup> All employees are subject to the same disciplinary policy, including the attendance policy. All employees are eligible for the Employer's medical, dental, and vision insurance, and 401(k) plan, as well as the same life and disability insurance. All employees receive the same paid time off. All

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<sup>36</sup> Employees receive a 30-minute meal break. It appears from the record that day shift employees also receive a 15-minute break in the morning and afternoon. The record does not reflect whether evening and night shift employees receive 15-minute breaks.

<sup>37</sup> Employees are responsible for supplying and maintaining their own scrubs.

<sup>38</sup> The Director of Nursing and the unit manager evaluate each LPN and CNA on their anniversary date, with input from other "staff" although the record does not reflect who the other staff is.

employees must attend the same in-service training programs on topics such as patient abuse.

## 2. ANALYSIS

### *The Appropriate Analytical Framework*

In Park Manor Care Center,<sup>39</sup> the Board ruled that the proper test for determining the appropriateness of bargaining units in non-acute health care institutions, such as nursing homes, is an “empirical community of interest test.” Under that test, the Board considers traditional community of interest factors, as well as those factors considered relevant by the Board in its rulemaking proceedings on Collective-Bargaining Units in the Health Care Industry, Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33900 (Sept. 1, 1988), reprinted at 284 NLRB 1528, and Final Rule, 54 Fed. Reg. 16336 (April 21, 1989), reprinted at 284 NLRB 1580. The Board further considered the evidence presented during rulemaking with respect to units in acute care hospitals, and prior cases involving either the type of unit sought or the type of health care facility in dispute. In remanding Park Manor to the Regional Director, the Board observed that if the employees excluded by the Regional Director could not themselves constitute a separate unit, they must perforce be included in the broader unit.<sup>40</sup>

The Board further explained in Park Manor<sup>41</sup> that finding a position to be technical (as the Board has traditionally found LPNs<sup>42</sup>) does not automatically lead to its exclusion from the broader unit, or to finding appropriate a separate

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<sup>39</sup> 305 NLRB 872 (1991).

<sup>40</sup> 305 NLRB at 875 fn 18.

<sup>41</sup> 305 NLRB at 876.

<sup>42</sup> See e.g., Pine Manor Nursing Home, 238 NLRB 1654, 1656 (1978).

technical unit. Rather, whether or not technical employees may constitute a separate appropriate unit depends on their relationship to other nonprofessional employees.<sup>43</sup>

In rulemaking, without deciding the appropriate units for such facilities, the Board observed that in nursing homes, "there is less diversity among professional, technical and service employees", and the staff as a whole is more integrated than in acute care hospitals. The Board further noted that, generally, nurses provide a less intensive, lower level of care to patients in skilled and extended care facilities than that provided in acute care hospitals, and thus receive lower wages, and that there is a greater overlap of functions in nursing homes among nonprofessionals than there is in acute care hospitals.<sup>44</sup>

In evaluating whether positions share a community of interest, the Board considers common supervision; similarity in employees' skills and functions; similarity in the scale and manner of determining earnings; similarity in benefits and working conditions; contact among employees; degree of functional integration; interchange; geographical proximity; and the history of any collective bargaining involving the parties. See Turner Industries Group, LLC, 349 NLRB 428, 430 (2007); Kalamazoo Paper Box Co., 136 NLRB 134, 137 (1962).

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<sup>43</sup> Hillhaven Convalescent Center, 318 NLRB 1017, 1017 (1995).

<sup>44</sup> See 53 Fed. Reg. 33927-33928, reprinted at 284 NLRB at 1567, as discussed in Hillhaven Convalescent Center, 318 NLRB at 1018.

The unit sought in the petition need not be the most appropriate unit, as long as it is an appropriate unit.<sup>45</sup> Thus, the Board looks first at the petitioned-for unit to see whether it is "an appropriate unit."<sup>46</sup>

***CNAs, Including the CNA Restorative Aide, CNA/ Central Supply Clerk, and CNA/ Activity Assistant, Comprise an Appropriate Unit Without LPNs***

While the LPNs and CNAs at the Employer's facility share some community of interest factors, such as common supervision,<sup>47</sup> frequent work-related contact, and similar working conditions, and although LPNs occasionally perform some of the same functions as CNAs, I find that these factors are outweighed by factors establishing that CNAs, restorative aides, and central supply clerks comprise an appropriate unit. I further find that a unit consisting solely of LPNs would comprise an appropriate unit under Park Manor.<sup>48</sup>

To begin with, LPNs must be high school graduates, and must be licensed in the State of Florida, for which they must complete a one-year course of study and pass an exam. LPNs also must possess current CPR certification. CNAs are not licensed, do not have to be certified in CPR, and are not required to have graduated from high school. The Board has found that LPNs' specialized skills

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<sup>45</sup> Dezcon, Inc., 295 NLRB 109, 111 (1989); see also P.J. Dick Contracting Inc., 290 NLRB 150 (1988).

<sup>46</sup> Dezcon, Inc., *supra* at 111.

<sup>47</sup> The unit manager and Director of Nursing supervise all nursing department staff.

<sup>48</sup> See Hillhaven Convalescent Center, 318 NLRB 1017 (finding appropriate a unit of nonprofessional employees, excluding LPNs, despite some community of interest factors weighing against their exclusion); Lincoln Park Nursing Home, 318 NLRB 1160 (1995) (same). See also, Cogburn Healthcare Center, 335 NLRB 1397, 1423 (2001) (finding appropriate a unit of nursing home CNAs and other nonprofessionals, excluding LPNs, for purposes of awarding a Gissel bargaining order).

and licensing requirements support excluding them from a unit of nonprofessionals.<sup>49</sup>

Because of their specialized skills and licensing, LPNs perform significant patient care duties that CNAs are not permitted to perform. These include administering medications,<sup>50</sup> providing respiratory treatment, treating wounds, transcribing physician orders to residents' charts, charting residents' medications, reviewing care plans daily to ensure that appropriate care is given and keeping physicians informed as to residents' conditions. In addition, LPNs have access to the medical supply room, while CNAs do not.<sup>51</sup> The Board has relied on similar factors in finding appropriate a unit of nonprofessionals excluding LPNs.<sup>52</sup>

The fact that CNAs, unlike LPNs, document Activities of Daily Living underscores that their focus is on the resident's daily routines, while the fact that LPNs chart nurses' notes shows that they focus on the resident's medical condition. The CNA is required to perform functions such as making beds, providing snacks, assisting with nail care, shaving, and hair care, and making sure mouth care is done upon rising, after meals, and at bed time. The evidence does not establish that LPNs routinely perform such duties.

The differences between the primary responsibilities of the LPN and CNA are further demonstrated by the Director of Nursing's testimony that on occasion,

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<sup>49</sup> Hillhaven Convalescent Hospital, 318 NLRB at 1018; Lincoln Park Nursing Home, 318 NLRB at 1161-1162.

<sup>50</sup> LPNs must have experience giving medications effectively and efficiently during federally mandated time frames.

<sup>51</sup> See, Madeira Nursing Center, 203 NLRB 323 (1973) (pre-rulemaking case finding the LPNs have separate community of interest apart from nurse aides based on educational requirements of LPNs and duties such as administering medication, charting residents' conditions, communicating with physicians, and maintaining control over drug supplies).

<sup>52</sup> Hillhaven Convalescent Hospital, 318 NLRB at 1018.

she has assigned an LPN to perform CNA duties. Whether because the census drops to 40 or less, or because a CNA calls off, the Employer judges it necessary on these occasions for the LPN to do the work of a CNA, illustrating that such work differs significantly from the LPN's functions. Yet the CNAs do not perform the principal functions of LPNs when the latter are absent.

The significant wage gap between LPNs and CNAs further supports a finding that a nonprofessional unit excluding LPNs is appropriate. The Board has found smaller disparities sufficient to support a similar conclusion.<sup>53</sup>

I recognize that, as the Employer argues, LPNs and CNAs are hourly paid, have the same benefit package, share the same break room and bulletin board, and are subject to the same personnel policies, as set forth in the Handbook.<sup>54</sup> Nonetheless, the Board has found these factors outweighed by factors supporting the exclusion of LPNs from a unit of CNAs.<sup>55</sup>

I also recognize that, as the Employer points out, LPNs and CNAs perform some of the same duties, such as helping residents with feeding, dressing, bathing, toileting, and transferring.<sup>56</sup> The Board has found such "overlapping

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<sup>53</sup> Lincoln Park Nursing Home, 318 NLRB at 1162 (finding wage gap supports excluding LPNs where LPNs earn \$14 to \$18 per hour and CNAs start at \$8.75 per hour); Hillhaven Convalescent Center, 318 NLRB at 1018-1019 (same where LPNs earn \$10 per hour and CNAs earn \$5.50 per hour).

<sup>54</sup> As explained above, the Handbook sets forth numerous policies governing LPNs and CNAs. However, the Handbook also covers all other employees, as well as statutory supervisors, and is of less weight in determining whether CNAs share a community of interest apart from LPNs. See Pomona Golden Age Convalescent Home, 265 NLRB 1313 (1982) (reversing regional director and finding appropriate petitioned-for unit of employees from one of employer's nine convalescent homes, despite handbook covering personnel policies for all employees at all nine facilities).

<sup>55</sup> Hillhaven Convalescent Center, 318 NLRB at 1018 fn 5.

<sup>56</sup> In this regard, I note that according to the position descriptions, the essential functions of the CNA include functions referred to as assisting with resident comforts, and food service functions, in addition to nursing functions. The position description of the LPN does not contain such functions, and consists mainly of nursing functions.

functions”<sup>57</sup> outweighed by other factors supporting finding appropriate a unit of nonprofessionals excluding LPNs.<sup>58</sup>

The examples of interchange on the record do not establish that LPNs and CNAs share such a strong community of interest as to require including them in one unit. First, as mentioned, CNAs do not work as LPNs. Moreover, the record contains eight examples of an LPN working as a CNA for some or all of a shift over a period of 45 days (November 18, 2009, to January 12, 2010). Given three shifts per day, this means that an LPN temporarily worked as a CNA on six per cent of the shifts (eight out of 135). This is insufficient to require inclusion of LPNs in the unit.<sup>59</sup>

The Employer cites Upstate Homes for Children, 309 NLRB 986 (1992), and Brattleboro Retreat, 310 NLRB 615 (1993). In Upstate Homes for Children, however, the union sought to represent only a portion of the technical employees (the LPNs), and a separate unit of professionals (RNs). In finding that an LPN unit was not appropriate, the Board relied on the contact and common supervision among LPNs, RNs, and other professional and technical employees not included in either of the petitioned-for units. This is clearly not analogous to

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<sup>57</sup> Hillhaven Convalescent Center, 318 NLRB at 1018.

<sup>58</sup> Hillhaven Convalescent Center, 318 NLRB at 1018-1019. See also, Pine Manor Care Nursing Home, 238 NLRB 1654 (1978) (pre-rulemaking case finding appropriate a unit limited to LPNs despite evidence LPNs often assisted nurse aides in performing their duties).

<sup>59</sup> Doubleday & Co., 165 NLRB 325, 326 (1967) (interchange of one to three or four employees every three or four weeks insufficient to require combining composing group employees with petitioned-for unit of bindery and shipping departments); Chin Industries, Inc., 232 NLRB 176, 177 (1977) (sporadic interchange between petitioned-for plant employees and branch stores and occasional substitution of plant employees for branch drivers insufficient to require inclusion of branch employees and drivers).

the instant case, in that the Union is not seeking to represent only a portion of the technical employees.<sup>60</sup>

In Brattleboro Retreat, the Board found the petitioned-for unit of technical employees to be inappropriate at the employer's combination psychiatric hospital/nursing home. Similar to here, all nonprofessionals shared many common personnel policies, benefits, and working conditions, and technical employees had significant work-related contact with nonprofessionals, and shared common supervision with nonprofessionals. However, in Brattleboro Retreat, unlike here, the wage differentials between technical employees and nonprofessionals were fairly small, and technical employees shared wage classifications with many nontechnical, nonprofessional employees. Also, many technical employees were only required to have a high school education. By contrast, here LPNs start at \$18 per hour, 180 per cent of the starting rate for CNAs.<sup>61</sup> Also, there is no evidence that LPNs share wage classifications with any nonprofessionals, and LPNs must all possess a Florida license in addition to a high school education and completion of a one-year LPN course of study.

The Employer also argues that CNAs share a closer community of interest with LPNs than they do with other nonprofessional positions that the Union seeks to include: CNA restorative aide, CNA/central supply clerk, and CNA/activity assistant.<sup>62</sup>

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<sup>60</sup> See Hillhaven Convalescent Center, 318 NLRB at 1019.

<sup>61</sup> There is also no evidence that the large gap between LPN and CNA starting wage rates becomes compressed with tenure.

<sup>62</sup> As stated earlier, the Employer's brief states that the Union seeks to include maintenance employees but the record shows that this is not the case.



The Board has held that "the test for determining whether a dual-function employee should be included in a unit is 'whether the employee [performs unit work] for sufficient periods of time to demonstrate that he ... has a substantial interest in the unit's wages, hours, and conditions of employment.'" Air Liquide America Corp., 324 NLRB 661, 662 (1997) (citing Berea Publishing Co., 140 NLRB 516, 518-519 (1963)).

The record does not reflect any job duties of the CNA restorative aide, CNA/central supply clerk and CNA/activity assistant that they do not share with other CNAs. The Employer clearly considers the employees holding each of these positions to be CNAs, as it lists them as such on its roster and the Employer agrees that they belong in a unit of nonprofessionals. It appears from the record that the CNA /restorative aide, CNA/central supply clerk, and CNA/activity assistant are paid as CNAs, and that CNA duties comprise a significant portion of their overall duties. These positions therefore belong in the unit, as the parties agree.<sup>63</sup>

Based upon the foregoing and the record as a whole, I conclude that the CNAs, CNA restorative aide, CNA/central supply clerk, and CNA/activity assistant comprise an appropriate unit, and that an appropriate unit need not include LPNs.<sup>64</sup> See Hillhaven Convalescent Hospital, 318 NLRB 1017 (1995); Lincoln Park Nursing Home, 318 NLRB 1160 (1995); see also, Cogburn

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<sup>63</sup> See Young Broadcasting of Los Angeles, d/b/a KCAL-TV, 331 NLRB 323 (2000) (holding that pursuant to Berea Publishing Co., 140 NLRB 516 (1963), employee who spends 60 per cent of her time as weekday associate producer and 40 per cent as weekend show producer belongs in unit of show producers notwithstanding also belonging to unit of newsroom employees by virtue of her work as weekday producer).

<sup>64</sup> Pool CNAs are eligible if they averaged four hours or more per week during the calendar quarter preceding the eligibility date. Sisters of Mercy Health Corp., 298 NLRB 483 (1990).

Healthcare Center, 335 NLRB 1397, 1423 (2001); Madeira Nursing Center, 203 NLRB 323 (1973).

As explained earlier, the Employer contends that the activity assistant belongs in the unit, while it is not clear from the record whether the Union seeks to include this position, or what duties it has apart from those of CNAs. Given its title, it appears that the activity assistant shares at least some common terms and conditions with the petitioned-for positions, such as the CNA/activity assistant. Moreover, exclusion of the activity assistant could render it difficult for employees in this position to obtain representation under the Act, as this would be the only unrepresented nonprofessional position.<sup>65</sup> For the foregoing reasons, I conclude that the activity assistant may vote subject to challenge.<sup>66</sup>

### **3. CONCLUSIONS AND FINDINGS**

- A. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
- B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
- C. The Union claims to represent certain employees of the Employer.

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<sup>65</sup> Elliott Precision Block Co., 218 NLRB 141, 142 (1975) (ordering inclusion in unit of employee who, if excluded, might become the only unrepresented employee and thus be denied the opportunity to be represented in collective bargaining).

<sup>66</sup> See Hillhaven Convalescent Center, 318 NLRB at 1019 (permitting disputed position of physical therapy assistant to vote under challenge because record was "too sparse as to his duties and responsibilities to make a judgment.")

D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act.

E. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time certified nursing assistants, CNA/restorative aides, CNA/central supply clerks, and CNA/activity assistants employed by the Employer at its St. Petersburg, Florida facility, excluding all other employees, registered nurses, maintenance employees, office clerical employees, guards and supervisors as defined in the Act.<sup>67</sup>

#### **Direction of Election**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the United Food and Commercial Workers International Union, Local 1625. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

#### **Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or

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<sup>67</sup> The activity assistant who does not have "CNA" as part of her job title may vote subject to challenge.

temporarily laid off.<sup>68</sup> Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

#### **Employer to Submit List of Eligible Voters**

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all eligible voters. North Macon

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<sup>68</sup> Pool CNAs are eligible if they averaged four hours or more per week during the calendar quarter preceding the eligibility date. Sisters of Mercy Health Corp., 298 NLRB 483 (1990).

Health Care Facilities, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before **March 19, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the list will be made available to all parties to the election, please furnish two copies of the list.<sup>69</sup>

#### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notice of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops an employer from filing objections based on nonposting of the Election Notice.

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<sup>69</sup> The list may be submitted by facsimile transmission to (813) 228-2874, or electronically, as well as by hard copy. See [www.nlr.gov](http://www.nlr.gov) for instructions about electronic filing. Only one copy of the list should be submitted if it is sent electronically or by facsimile.

### **Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W. Washington, D.C. 20570-0001. This request must be received by **March 26, 2010**. The request may not be filed by facsimile, but may be filed electronically.<sup>70</sup>

DATED at Tampa, Florida this 12<sup>th</sup> day of March, 2010.

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Rochelle Kentov, Regional Director  
National Labor Relations Board, Region 12  
201 E. Kennedy Boulevard, Suite 530  
Tampa, Florida 33602

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<sup>70</sup> See [www.nlr.gov](http://www.nlr.gov) for instructions about electronic filing and the Board's Rules and Regulations with respect to filing requirements generally.

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